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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. .....

WESTERN AIR LINES, INC., a corporation,
Respondent,

vs.

CATHERINE J. MICHUNOVICH, Treasurer of Yellowstone County, Montana; YELLOWSTONE COUNTY; and THE STATE BOARD OF EQUALIZATION OF THE STATE OF MONTANA,
Petitioners.

Petition for Writ of Certiorari
TO THE SUPREME COURT OF MONTANA

Petitioners pray that a Writ of Certiorari issue to review the Judgment of the Supreme Court of the State of Montana, entered in the above cause on April 24, 1967 modifying the Judgment of the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone, and remanding the matter to the District Court with instructions to make and enter Judgment in favor of the

Respondents and against the Petitioners consistent with the views expressed in the Montana Supreme Court Opinion.

OPINIONS BELOW

The Opinion of the Supreme Court of Montana is unofficially reported in 428 Pac.2d 3 (1967), but has not as yet been officially reported in the Montana Reports. This Opinion is shown commencing at page 1 of the Appendix. The District Court prepared no separate opinion but entered certain Findings of Fact and Conclusions of Law which are shown commencing at page 12 of the Appendix.

JURISDICTION

After the initial decision of the Montana Supreme Court of April 24, 1967, an Order Denying Petition for Rehearing was entered on June 15, 1967. Thereafter, Remittitur was issued and final Judgment was rendered on June 19, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3). The Court below decided against Petitioners' contention that the value of Respondent's flight property operated in the State of Montana should be ascertained by an allocation from the value of the entire flight property operated by Respondent through the "unitary method" of assessment. The sole basis of

the decision rendered by the Court below was that the mode of assessment applied by Petitioners was not in harmony with the decisions of this Court that set forth the requirements of the due process clause of the Fourteenth Amendment of the United States Constitution relative to the taxation by a state of interstate transportation utilities. The lower Court specifically stated in its Opinion that a unitary method of assessment as was levied by Petitioners is sanctioned by the Montana laws regarding the assessment of airlines but could not be constitutionally applied to Respondent. (Appendix, p. 6.) Accordingly, the decision of the Montana Court involved a federal question of substance and Petitioners contend that it was not in accord with applicable decisions of this Court.

QUESTION PRESENTED

The question presented by this Petition is whether a state may constitutionally apply the unitary method of assessment, described below, to an airline, less than 1% of whose passengers on its aircraft passing through the state transfer to or from other lines of the airline's system.

STATUTORY PROVISIONS INVOLVED

The statutes involved in this case are set forth verbatim commencing on page 29 of the Appendix.

STATEMENT

Western Air Lines brought suit against Petitioners for the return of certain 1964 property taxes paid by it under protest. The Montana District Court afforded Western Air Lines a degree of relief. (Appendix, pp. 12-26.) Western Air Lines appealed to the Supreme Court of Montana, which granted additional relief. (Appendix, p. 1.)

The facts are as follows: In the assessment year 1964 Western Air Lines engaged in the business of commercially transporting passengers and cargo over certain connected flight routes in the United States and Canada. One of these routes passed through and stopped in Montana. The only aircraft that operated in Montana were older Douglas DC-6Bs. Concurrently with the operation of the Douglas DC-6Bs on the route that passed through Montana, Western Air Lines operated Prop Jet Electras and Boeing 720-Bs on flight routes that did not pass through or stop in Montana. (Complaint and admissions in Answer—Record.) Western Air Lines operated all its aircraft under the same general management (Appendix, pp. 7-8), and all capitalized net income and stock and debt figures submitted by Western Air Lines are those which cover its total operation (Exhibits to Stipulation—Record). None of the stock and debt or capitalized net income figures submitted by Western

Air Lines were ascertained solely from the operations of the flight route that passed through Montana. (Record.)

The method of assessment utilized by the Petitioner State Board of Equalization was as follows: The value of all Western Air Lines flight property was ascertained through a capitalized net income and a stock and debt approach. After this value was determined there was allocated to the State of Montana from this value Montana's share through utilization of certain allocation factors which were calculated to account for relative differences of aircraft operations in the State of Montana as compared with aircraft operations over the airline's entire system. (Exhibits 2 and 4 to Stipulation—Record.) This mode of assessment is known as a unitary method and is authorized by Section 84-6404, Revised Codes of Montana, 1947 (Appendix, p. 6.)

The Supreme Court of the State of Montana based the relief which it granted to Western Air Lines on the fact that less than 1% of the passengers on Western Air Lines aircraft that passed through Montana transferred to or from other lines of its system. (Appendix, pp. 7-8.) This fact demonstrated to the Court that there was a "total lack of significant 'organic unity' between the DC-6B operation and the rest of Appellant's [Western Air Lines] system," as must

exist in order that a system-wide "unitary" method assessment be valid. (Appendix, pp. 7-8.) The Court based this finding of lack of "organic unity" and the requirement that it must exist on the cases of *Fargo vs. Hart*, 193 U.S. 490, 48 L.Ed. 761; *Galveston, Harrisburg & San Antonio Ry. Co. vs. Texas*, 210 U.S. 217; *U. S. Express Co. vs. Minnesota*, 223 U.S. 335; *Union Tank Line Co. vs. Wright*, 249 U.S. 275, 63 L.Ed. 602; *Pullman Company vs. Richardson*, 261 U.S. 330, 338, 43 S.Ct. 366, 368, 67 L.Ed. 682. (Appendix, pp. 3, 4 and 5.

REASONS FOR GRANTING THE WRIT

In the case of an interstate business that is partly within and partly without a state, the assessment of the property located within that state may be ascertained by determining the full value of the business' entire system, and then allocating to the property located in that state a share of the total value of the business. *Fargo vs. Hart*, 193 U.S. 490, 48 L.Ed. 761; *Galveston, Harrisburg & San Antonio Ry. Co. vs. Texas*, 210 U.S. 217; *U. S. Express Co. vs. Minnesota*, 223 U.S. 335; *Union Tank Line Co. vs. Wright*, 249 U.S. 275, 63 L.Ed. 602; *Pullman Company vs. Richardson*, 261 U.S. 330, 338, 43 S.Ct. 366, 368, 67 L. Ed. 682; *Southern Ry. Co. vs. Kentucky*, 274 U.S. 76, 81, 82; *Wallace vs. Hines*, 253 U.S. 66, 64 L.Ed. 782; *Blodgett vs. Holden*, 275 U.S. 142, 72 L. Ed. 206.

There are two tests which must be met in order that a unitary assessment be upheld. These tests are that the operation of the interstate business in the taxing state be an organic part of the entire business, and that the allocation of value from the entire business to the property located in the taxing state be proper. *Fargo vs. Hart*, 193 U.S. 490, 48 L.Ed. 761; *Galveston, Harrisburg & San Antonio Ry. Co. vs. Texas*, 210 U.S. 217; *U. S. Express Co. vs. Minnesota*, 223 U.S. 335; *Union Tank Line Co. vs. Wright*, 249 U.S. 275, 63 L.Ed. 602; *Pullman Company vs. Richardson*, 261 U.S. 330, 338, 43 S.Ct. 366, 368, 67 L.Ed. 682; *Southern Ry. Co. vs. Kentucky*, 274 U.S. 76, 81, 82; *Wallace vs. Hines*, 253 U.S. 66, 64 L.Ed. 782; *Blodgett vs. Holden*, 275 U.S. 142, 72 L.Ed. 206. All of the cases relied upon by the lower Court dealt with the second issue, viz., was there a proper allocation of value from the entire system to the property located in the taxing state? There is only one case in which this Court was concerned solely with the question of whether the operation of the interstate business in the taxing state was an organic part of the entire system. *Southern Ry. Co. vs. Kentucky*, 274 U.S. 76, 81, 82.

Assuming that the operation of the interstate business in the taxing state is an organic part of the entire system, the sole bases upon which the allocation of value may be declared invalid are where the meth-

od of allocation is arbitrary or capricious, or the resulting tax is grossly excessive. (*Wallace vs. Hines*, 253 U.S. 66, 64 L.Ed. 782; *Blodgett vs. Holden*, 275 U.S. 142, 72 L.Ed. 206; *Union Tank Line Co. vs. Wright*, 249 U.S. 275, 63 L.Ed. 602; *Great Northern Railway Co. vs. Weeks*, 297 U.S. 135, 80 L.Ed. 532.) In the instant cause there has been no finding that the method of allocation utilized by the Petitioner State Board of Eqaulization was arbitrary or capricious, nor is there an express finding that the resultant assessment was grossly excessive. Therefore, the only basis upon which the lower Court's decision may be upheld is that the operation of the Western Air Line flight route that passed through the State of Montana was not an organic part of its entire system; and it is precisely on this point that the Montana Supreme Court based its decision. (Appendix, pp. 7-8.)

In the cases of *Wallace vs. Hines*, supra, *Blodgett vs. Holden*, supra, *Union Tank Line Co. vs. Wright*, supra, and *Great Northern Railway Co. vs. Weeks*, supra, and in all the cases cited by the lower Court, this Court indulged in the presumption that the interstate businesses involved were operated as a single unit, and that the only question remaining was whether the allocation of the total unit value to the property located in the taxing state was proper. The basis of the decision rendered by the Supreme Court of Montana is one which has never been utilized by

this Court in the determination of whether the operation of the interstate business in the taxing state was an organic part of the entire system. In *Southern Ry. Co. vs. Kentucky*, 274 U.S. 76, 81, 82, the Court held that the Southern Ry. Co. operation in the State of Kentucky was not an organic part of its entire system for a reason completely different than the one expounded by the lower Court.

Should this Court uphold the decision of the Supreme Court of Montana, sparsely populated states will be placed at a distinct disadvantage in their assessment of interstate businesses. There is a relatively small percentage of passengers and cargo that pass through these states which transfer to or from other lines of the interstate business' systems. Accordingly, if the yardstick established by the Supreme Court of Montana is upheld such states will be prevented from applying a unitary assessment to interstate businesses and thus deprived of the right to tax "the enhanced value which comes to the property in the State through its organic relationship to the system" (*Pullman Co. vs. Richardson*, 261 U.S. 330, 338).

CONCLUSION

The assessment levied by the Petitioner State Board of Equalization on the flight property located in the State of Montana was based on a unitary method

which took into consideration the value of all Western Air Lines flight property. The method of allocation utilized was not arbitrary or capricious, and did not result in a grossly excessive tax. This assessment was made against an interstate business under the supervision of a single general management. The Judgment of the Supreme Court of Montana is based on a federal question of substance and is not in accord with the applicable decisions of this Court.

Respectfully submitted,

FORREST H. ANDERSON
Attorney General of Montana

Capitol Building
Helena, Montana
Attorney for Petitioners.

Of Counsel:

DONALD A. GARRITY
WILLIAM A. DOUGLAS.

APPENDIX A

OPINION OF THE SUPREME COURT OF MONTANA

(Title of Court and Cause)

Crowley, Kilbourne, Haughey, Hanson and Gallagher,
Billings, Montana,

Jardine, Stephenson, Blewett and Weaver,
Great Falls, Montana,

John D. Stephenson, Great Falls,
argued for Appellant.

John L. Adams, Jr., County Attorney,
Billings, Montana,

Harold F. Hanser, Billings, Montana,
argued for Respondents,
William A. Douglas, Helena, Montana,
argued for Respondents.

Submitted: February 9, 1967
Decided: April 24, 1967

FILED: April 24, 1967

THOMAS J. KEARNEY, Clerk

Mr. Justice Castles delivered the Opinion of the Court.

This is an appeal from a judgment rendered against the appellant Western Airlines for certain property taxes levied by respondents. The assessment in question was on flight property used by appellant in Mon-

tana in 1964. The appellant is a scheduled interstate airline company. On the assessment date in question, it owned and used three types of aircraft throughout its system: Boeing 720B's, Lockheed Electras and Douglas DC-6B's. The appellant's operations in Montana were limited to DC-6B piston aircraft. Neither the 720B jets nor the Electra prop jets were operated into or over Montana. In 1964, the appellant filed with the Board of Equalization the report required by Section 84-6403, R.C.M. 1947. Upon being advised of a tentative assessment of its flight property at $1,190,000, appellant appeared before the Board to show cause why that figure should be lowered. The Board did not lower the assessment, but instead fixed it at the tentative figure of $1,190,000. It apportioned $371,263 of the assessed value to Yellowstone County, which then levied a tax of $16,688.99 thereon.

On November 30, 1964, appellant paid $763.85 of said tax to Yellowstone County. It paid the remaining $15,925.14 under written protest. This action was commenced to recover the $15,925.14 paid under protest. The facts were presented on stipulation to the District Court judge, sitting without a jury. The court below gave a judgment in favor of appellants for $5,039.23. In this appeal, appellant seeks to recover the balance under protest.

There are two fundamental issues presented. The first concerns the propriety of the formula used by the Board of Equalization to determine the value of flight property under the "unitary" method of taxation. The second issue is whether the depreciated value of aircraft should have been used in this formula rather than some higher figure.

The respondent used the "unitary" or "going concern" approach, as distinguished from a direct ad valorem assessment. The "unitary" method represents an attempt to realize a fair assessment value *on property which is not habitually located in* any given state, but which is used extensively in interstate commerce. The underlying philosophy of the "unitary" method is that the property so used forms a part of an organic system and may be assessed in terms of the economic contribution which each component makes to the entire system. This approach has been firmly established in a series of decisions of the Supreme Court of the United States. Fargo v. Hart, 193 U.S. 490, 48 L.Ed. 761; Galveston, Harrisburg & San Antonio Ry. Co. v. Texas, 210 U.S. 217; United States Express Co. v. Minnesota, 223 U.S. 335; Union Tank Line Co. v. Wright, 249 U.S. 275, 63 L.Ed. 602.

A good statement of the purpose and operation of the "unitary" method is found in Pullman Co. v.

Richardson, 261 U.S. 330, 338, 43 S.Ct. 366, 368, 67 L.Ed. 682.

"And, if the property be part of a system and have an augmented value by reason of a connected operation of the whole, it may be taxed according to its value as part of the system, although the other parts be outside the state; —in other words, the tax may be made to cover the enhanced value which comes to the property in the State through its organic relation to the system".

Thus the "unitary" method determines not only the apportionate share of the entire enterprise which may be taxed by each state but also determines the "enhanced value" attributable to the equipment used by virtue of its being a component part of the system. The "unitary" method assumes that the value of the entire system, as a going concern, is somewhat greater than the total fair market value of its equipment.

A critical issue in any form of taxation of tools used in interstate commerce is whether constitutional prohibitions on undue interference with interstate commerce have been violated. Western Airlines contend that they have.

In Pullman v. Richardson, supra, at page 338, the Court said:

"In taxing property so situated and used a State may select and employ any appropriate means of reaching its actual or full value as part of a going concern; —such as treating the gross receipts from its use in both intrastate and interstate commerce as an index of measure of its value, —and if the means do not involve any discrimination against interstate commerce and the tax amounts to no more than what would be legitimate as an ordinary tax upon the property, valued with reference to its use, the tax is not open to attack as restraining or burdening such commerce".

Let us examine the procedure used by the respondent Board, Section 84-6402, R.C.M. 1947, provides for the taxation of flight property used by scheduled airlines in Montana. Section 84-6404, R.C.M. 1947, provides for the manner in which the value of flight property may be determined. It states:

"The board shall determine the full and true valuation of all flight property operated or used by every scheduled airline company in air commerce in this state. In determining the valuation apportioned to this state of such flight property, the board may consider the proportion of total tonnage in the state, total time in equated plane hours, number of revenue ton miles and number of arrivals and departures as required to be reported under section 84-6403".

The Board of Equalization examined the appellant's entire operation to determine what proportion of the four factors enumerated in Section 84-6404 could be attributed to appellant's business conducted in Montana . An average percentage of 3.3134% was arrived at in this manner which was then applied to the sum of Western Airlines' total stock and debt for all aircraft ready for flight and Western's total net earning capitalized at 6%. The resulting figure of $1,972,396.00 formed the basis for the assessment which is herein issue.

The appellant does not attack the use of the "unitary" method as such, but insists that it be applied only to that portion of their business arising directly from the use of DC-6B aircraft. The position of Western Airline is that the result of applying the "unitary" technique to their whole operation is to tax those aircraft—Electras and 720B's—which were never in this state. It is clear from the record that the Board of Equalization never attempted to directly tax such aircraft.

Chapter 64 of Title 84, R.C.M. 1947, provides for the manner in which "flight property" used in Montana is to be assessed and taxed. There can be little doubt but that the Montana Legislature intended to employ a type of "unitary" taxation when the chapter is read as a whole. But we feel that the most signifi-

cant problem which remains is whether the use of DC-6B aircraft in this state was sufficiently related to the balance of appellant's business to include in the assessment formula factors attributable to the use of other types of aircraft. For the sake of brevity, we shall refer to such factors as "jet values".

The respondent stipulated to statistics introduced by appellant showing what percentage of passengers arriving in or departing from Montana on DC-6B's transferred to other types of planes. The maximum percent of such transfer passengers is agreed to be 0.76%, or 0.67% in terms of passenger revenue mlies. These figures are stated as theoretical maxims, with the actual percentage being closer to 0.50%. To the Court, these figures demonstrate a total lack of significant "organic unity" between the DC-6B operation and the rest of appellant's system. It is the concept of "organic unity" which permits the application of a "unitary" assessment and which at the same time limits the scope of this form of taxation. Even though this general technique may be permitted under Montana law—and we have concluded that it is—certain constitutional requirements must be satisfied. Otherwise the "unitary" method may become an octopus which extends the taxing power of the state beyond the legal limit.

Although Western Airlines offers basically the same

type of service throughout its system and is a single going concern, it is the opinion of the Court that the concept of "organic unity" must include more than a mere managerial overlay. The stipulated facts clearly indicate that the DC-6B system was an independent line in that it bore no substantial relationship to the rest of appellant's system apart from carrying the same name, etc. We therefore believe that here it would be patently unjust to permit a "unitary" formula to consider "jet values". Since the use of the "unitary" method is intended to prevent excessive taxation, the taxing agency should bear a certain burden of showing the propriety of their action. It is true as a general rule that the taxpayer must overcome the presumption in favor of the correctness of the assessment. Statistics presented by appellant and stipulated to by the respondents at least indicate prima facie a lack of substantial relationship. The Board of Equalization, under such circumstances, should not be permitted to rely almost entirely upon legal presumptions which favor them. The ultimate issue is one of fact, not legal theory, and we feel that evidence presented by appellant is conclusive of the matter.

Our conclusion here is predicated upon finding a separate system operated with DC-6B aircraft. We might add parenthetically that the type of aircraft

used is not the significant factor to be considered. In theory, all three types of planes used by appellant could have been employed in Montana in the same so-called "feeder line", and the same result would follow in the absence of a substantial relationship to other systems, assuming that these planes were used only within the "feeder line". The problem before us is simplified somewhat by the fact that only DC-6B's were used in this state, and the facts stipulated to as hereinbefore referred to demonstrate an "independent" rather than a "feeder" line.

It is not necessary for us to determine at this time what degree of inter-relationship must exist to extend the scope of the "unitary' 'method. We feel that less than one percent is clearly inadequate.

The formula used by the District Court in rendering its judgment eliminated "jet values" from the stock and debt portion of the equation but not from the capitalized earning index. We cannot find any logical justification for this approach; if "jet values" are properly to be considered, they should appear in both factors. If they are not to be considered—as we hold in this case—"jet values" should be eliminated from both the stock and debt figure and the capitalized earnings portion.

We now turn to consider whether the depreciated value of the DC-6B's should have been used by the

respondent in the "unitary" method formula rather than some higher figure.

Clearly the use of a depreciated value would in no manner approximate the value of the aircraft to the appellant. The taxation policy contemplated by the "unitary" method is quite different from that permitting the use of depreciated values in other taxation situations. Appellant does not, and indeed cannot, argue that the depreciated value of the aircraft represents their actual worth.

The Board of Equalization assessed the aircraft at 98.398% of their original cost, yielding a figure of $1,190,000.00. The depreciated figure sought by appellant would lower the assessment to $54,460.00. The highest price obtained for a DC-6B by appellant in the open market was $335,000.00. It is important to note that the "unitary" method tends to assess property at its value to the owner thereof. This figure might be more than the fair market value of the property. In Southern Ry. Co. v. Kentucky, 274 U.S. 76, 81, 82, the Court said:

"The value of the physical elements of a railroad—whether that value be deemed actual cost, cost of reproducing new, cost of reproduction less depreciation or some other figure—is not the sole measure of or guide to its value in operation."

While we are reluctant to approve the 98% plus figure used by the respondent, it is no less tenable than the depreciated figure sought by appellants. Since no intermediate amount is being sought by either party, we are constrained to recognize, in this instance, certain prerogatives enjoyed by the Board of Equalization. The amount of the resulting tax does not appear to us to be unreasonable or burdensome.

The parties have thoughtfully stipulated to alternative results which they agree should follow the conclusions of law established by this court. We have determined that "jet values" may not be considered, but that the 98% plus evaluation of the DC-6B's may be permitted to stand. The assessment of appellant's flight property should accordingly be reduced to $671,377. Of this amount, $209,469.62 should be apportioned to Yellowstone County, resulting in a tax of $9,416.08. Appellant is therefore entitled to a judgment for $7,272.91.

The case is remanded with instructions to enter judgment for appellants for $7,272.91.

Wesley Castles
Associate Justice

APPENDIX B

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE DISTRICT COURT OF THE THIRTEENTH JUDICIAL DISTRICT IN AND FOR THE COUNTY OF YELLOWSTONE

(Title of Cause)

This action having been submitted to the Court, for decision on the merits, without a jury, on the basis of the admissions in the pleadings, the answers to the Interrogatories, and a Stipulation by Counsel for all of the parties of facts as true, without prejudice however to the rights of either plaintiff or defendants to assert their respective contentions as to the correct conclusions of law resulting therefrom and to contest the adverse party's or parties' contentions in such regard and with each party specifically reserving all objections to the admissibility and relevance of any of the facts covered by said Stipulation to be set forth and argued in the briefs of the said parties, and the briefs of counsel having been filed, and the Court, being now fully advised, hereby finds the following

FINDINGS OF FACT:

I.

That during all of the times herein mentioned the plaintiff, Western Air Lines, Inc., was, and still now is, a corporation organized and existing under

the laws of the State of Delaware, and authorized to do and doing business as a foreign corporation in the State of Montana.

II.

That during all of the times herein mentioned, the defendant, Yellowstone County, was and still now is a body politic and corporate of and in the State of Montana, and defendant, Catherine J. Michunovich was and still now is the Treasurer thereof.

III.

That during all of the times herein mentioned, the defendant, The State Board of Equalization of the State of Montana, hereinafter referred to as the "defendant Board", was and still now is an agency of the State of Montana, created under and by virtue of the provisions of Section 15 of Article XII of the Constitution of Montana.

IV.

That during all of the times herein mentioned the plaintiff operated, and still now operates, as a scheduled airline company engaged in air commerce in the State of Montana under a certificate of convenience and necessity issued by the United States Civil Aeronautics Board and elsewhere in the United States and Canada, and in this connection plaintiff owned and owns aircraft fully equipped for flight used in air

commerce within the State of Montana and elsewhere, consisting of DC-6B's, as well as other such aircraft not so used in the State of Montana, but used elsewhere, namely 720B's and Electra's.

V.

That the plaintiff has duly and properly filed with the defendant Board and with the County Assessor of the defendant Yellowstone County all and every return, report, statement, and all information required by the laws of the State of Montana to be filed relative to and in connection with the assessment of the plaintiff's property in the State of Montana, and in said county, for taxation purposes for the year 1964, including the report required by Section 84-6403, Revised Codes of Montana, 1947, as amended.

VI.

That by letter dated May 13, 1964, defendant Board notified plaintiff that it had determined the value of plaintiff's flight property in the State of Montana to be a "tentative approximate value of $1,190,000.00 for taxation purposes for the year 1964," and stated that a hearing with regard thereto could be had on Thursday, May 21, 1964, at 2:00 P.M. at the defendant Board's office in Helena, Montana, if said figure was not satisfactory to plaintiff.

VII.

That said figure was not satisfactory to plaintiff, and plaintiff appeared at the hearing to show cause why the same should be lowered.

VIII.

That by letter dated June 3, 1964, defendant Board notified plaintiff that it had, after said hearing, determined the value of plaintiff's flight property in the State of Montana to be $1,190,000.00 for taxation purposes for the year 1964.

IX.

That thereupon the defendant Board apportioned such assessment to the counties in the State of Montana in or through which plaintiff's airline operated, and in this connection apportioned the sum of $371,263.00 to defendant Yellowstone County.

X.

That defendant Yellowstone County thereupon levied a tax on its apportioned share of plaintiff's flight property for the year 1964 in the sum of $16,688.99.

XI.

That on November 30, 1964, plaintiff paid one portion of said tax in the sum of $763.85 to the Treasurer of defendant Yellowstone County without protest, and on said day paid the remaining portion of said tax in the sum of $15,925.14 to said Treasurer under

written protest, specifying therein the grounds of such protest.

XII.

That defendant Yellowstone County likewise levied a tax of $381.52 against plaintiff's ground property in Yellowstone County for the year 1964, and plaintiff paid said tax in full to the Treasurer of Yellowstone County before the same became delinquent.

XII.

That defendant Board computed said $1,190,000.00 in the following manner:

*Total All Flight Property		124,234,257	
*Total Aircraft Ready for Flight		96,739,378	77.8685%
*Total Stock 5 Yr. Avg.		42,388,275	
* " Debt " "		30,651,105	
		73,039,380	
Less Non Operating			
*Investments & Spec. Funds		(7,328,971)	
*Acct. 1420 Other Assets		(23,385)	
*Short Term Prepayments		(1,390,325)	
*Acct. 1820-1890 Deferred Charges		(379,936)	
*Acct. 1010-1299		(8,448,710)	
		(17,571,327)	
Net		55,468,053	
		x 77.868%	
A. Total Stock and Debt for all aircraft ready for flight			43,191,863
*5 Yr. Avg. Net Earnings	4,551,790		
Cap. @ 6%	75,863,862		
B. Total Net Earnings Cap. @ 6%			75,863,862
Avg. of A and B			59,527,862

Submitted at Hearing Thursday, May 21, 1964
Ratios — Montana to System

*Total Tonnage	556,221	11,938	2.1463
*Equated Plane Hours	172,899	5,489	3.1747
*Revenue Tax Miles	166,657,088	2,384,435	1.4307
*Arrivals and Departures	174,898	11,372	6.5021
			13.2538
Avg. of 4			3.3134
Montana's Full Value			1,972,396
Equalized @ 68%			1,341,229

Based upon the above computations; an examination of the 1963 assessment; and an appraisal of the airline's condition in 1964 as compared to 1963, through the use of the annual reports, the State Board of Equalization has, in its judgment, determined the final assessment valuation to be $1,190,000 for assessment year 1964.

*Information and figures supplied to Board by airline in its annual report of flight property for the year 1964, and used as a basis for the Board's determination of the dollar value of the flight property of the airline in the State of Montana for taxation purposes for the year 1964.

XIV.

That in the defendant Board's formula, as aforesaid, the figure of $96,739,378 representing the original cost of all Aircraft Ready for Flight includes the original cost not only of the plaintiff's DC-6B's (which was $18,276,848) but also of plaintiff's 720B and Electra aircraft never used in air commerce in Montana and the ratio of 77.8685% derived by the Board from said figure was then applied to the value of plaintiff's stock and debt.

XV.

That in the defendant Board's formula, as aforesaid, the four "Ratios—Montana to System" were calculated on a comparison of the system figures, including those for not only DC-6B's but also those for 720B and Electra aircraft never used in air commerce in Montana with the Montana figures to produce an average of 3.3134 rather than on a comparison of system DC-6B figures and the Montana figures to produce an average of 9.8551.

XVI.

That in the defendant Board's formula, as aforesaid, the value of plaintiff's situs property located in Yellowstone County, Montana, on which plaintiff pays personal property taxes to the Treasurer of Yellowstone County, was included in the value Capitalized net operating earnings.

XVII.

That an assessment based on figures which exclude Electra and 720B figures from determination of the ratio to be applied to stock and debt and likewise from the System figures used to calculate the four "Ratios—Montana to System" and which likewise excludes situs property on which plaintiff pays personal property taxes to the Treasurer of Yellowstone County would have amounted to $830,638 determined as follows:

Total All Property at Cost (page 7 of Report)	$124,234,257		
Cash and Liquid Credits	3,268,929	$127,503,186	
Aircraft Ready for Flight (Cost)		$ 96,739,382	75.8721%
Montana Flight Property (Cost)		$ 18,276,846	14.3344%
Net Stock & Debt Value—5 Yr. Avg. Times Montana Percent		$ 63,916,764 14.3344%	
A. Total Stock and Debt for all Montana Aircraft Ready for Flight			$ 9,162,085
B. 5-yr. Average Net Earnings Capitalized at 6%		$ 75,863,862	
Flight Property Percentage (75.8721%)			$57,559,505

All Flight	System	Montana	Montana %	Weighted 30% ea. item, except arr. & Dep., 10%
Tonn. Orig. & Discharged	556,221	11,938	2.1463%	.6439%
Equated Plane Hours	172,899	5,489	3.1747%	.9524%
Revenue Ton Miles	166,657,088	2,384,435	1.4307%	.4292%
Arrivals & Departures	174,898	11,372	6.5021%	.6502%
Average of 4				2.6757%
Montana Ratios (By Type)				
Tonn. Orig. & Dicharged	159,240	11,938	7.4969%	2.2491%
Equated Plane Hours	132,336	16,036	12.1176%	3.6353%
Reveune Ton Miles	28,729,889	2,219,675	7.7261%	2.3178%
Arrivals & Deparures	68,800	11,372	16.5291%	1.6529%

Average of 4		9.8551%
Stock & Debt	$ 9,162,085 x 9.8551% =	$ 902,933
Capitalized Net Income	$57,559,505 x 2.6757% =	1,540,120
		$2,443,053
Average		$1,221,527
Equalized @ 68%		$ 830,638

XVIII.

That in the defendant Board's formula set forth in paragraph XIII hereof, the 1964 full value of all of plaintiff's DC-6B aircraft as determined by defendant Board as of December 31, 1963 was 98.398% of the original cost of such aircraft to plaintiff when the same were acquired from 1954 through 1958, which said DC-6B's were being flown between Salt Lake City, Utah and Pocatello and Idaho Falls, Idaho, and Butte, Helena, and Great Falls, Montana (Airmail route 19) and likewise between Denver, Colorado, and Cheyenne, Casper and Sheridan, Wyoming, and Billings and Great Falls, Montana (Airmail route 28), and between Great Falls, Montana and Calgary, Alberta, Canada (Airmail route 53), and also between Salt Lake City, Utah, and Casper, Wyoming, and Rapid City, and Pierre, and Huron and Sioux Falls, South Dakota, and Minneapolis-St. Paul, Minnesota (Airmal route 35), and from Denver, Colorado to

Rapid City, and Pierre, and Huron, South Dakota, and Minneapolis-St. Paul, Minnesota (Airmail route 35), and between Los Angeles and San Francisco, California and Los Angeles and Oakland, California (Airmail route 63), and between Los Angeles, California and Las Vegas, Nevada (Airmail route 13).

XIX.

That the maximum selling price at which plaintiff actually sold DC-6B's fully equipped ready for flight in 1963 was $355,000.00. The defendant Board never requested and plaintiff never furnished this information.

XX.

That if in making the assessment set forth in paragraph XVII hereof depreciated costs had been used rather than original costs the assessment would have been calculated at $539,433.00.

XXI.

That in the months of August, 1963, and January, 1964, no more than 0.76% of plaintiff's 720B and Electra origin and destination passengers were transferred to or from plaintiff's Montana DC-6B service, and on the basis of revenue passenger miles the figure was no more than 0.67%.

XXII.

That if in making an asessment that not only excluded 720B and Electra aircraft figures from Stock

and Debt and from "Ratio,—Montana to System" and excluded situs property, all as set forth in paragraph XVII hereof, the 720B and Electra figures had likewise been excluded from Capitalized net earnings, the 1964 assessment of plaintiff's flight property would have been calculated at $671,377.00.

XXIII.

That if in making an assessment on the basis set forth in paragraph XXII hereof depreciated costs had been used rather than original costs the assessment would have been calculated at $54,460.00.

XXIV.

That 31.20% of the 1964 assessment of plaintiff's flight property is properly allocable to Yellowstone County, the figure so allocated is properly reduced to a taxable value of 40%, and the tax is then computed at a tax rate of 112.38 on such taxable value. A statewide assessment of plaintiff's flight property for 1964 at $830,638.00 produces an apportioned assessment to Yellowstone County of $259,159.00 with a taxable value of $103,664.00 and a tax of $11,649.76.

XXV.

The following schedule shows all Aircraft Ready for Flight owned by plaintiff on December 31, 1963, as well as the date of manufacture of each plane, the date it was acquired by plaintiff, its original cost, and its depreciated cost on December 31, 1963.

Type	Ship No.	Mfg'd.	Acquired	Cost	Cost
DC-6B	N93120	6-25-57	6-25-57	1,249,148	54,338
	N93121	7-25-57	7-25-57	1,249,146	54,338
	N93122	8-23-57	8-23-57	1,250,969	54,338
	N93123	8-27-57	8-27-57	1,250,970	54,338
	N93124	9- 5-57	9- 5-57	1,250,981	54,338
	N93125	1-27-58	1-27-58	1,250,540	54,338
	N93126	2-10-58	2-10-58	1,250,540	54,338
	N93127	3- 6-58	3- 6-58	1,250,540	54,338
	N93128	4- 1-58	4- 1-58	1,250,540	54,338
	N93129	7-28-58	7-28-58	1,405,106	54,338
	N93130	8-19-58	8-19-58	1,405,106	54,338
	N93131	8-27-58	8-27-58	1,405,106	54,338
	N93132	9-23-58	9-23-58	1,404,078	54,338
	N93133	9-30-58	9-30-58	1,404,078	54,338
				18,276,848	760,732

Company: Western Air Lines. Year Ended December 31, 1963

AIRCRAFT (Owned) AIRCRAFT READY FOF FLIGHT

Type	Ship No.	Date of Mfg.	Date Acquired	Cost	Depreciated Cost
Electra	N7135C	5-19-59	5-19-59	2,251,330	878,292
	N7136C	7- 9-59	7- 9-59	2,251,629	878,590
	N7137C	7-27-59	7-27-59	2,181,472	808,434
	N7138C	9- 1-59	9- 1-59	2,186,775	813,737
	N7139C	9-25-59	9-25-59	2,189,672	816,634
	N7140C	1-18-60	1-18-60	2,188,436	916,376
	N7141C	3-23-61	3-23-61	2,177,033	1,095,594
	N7142C	5-17-61	5-17-61	2,197,987	1,116,547
	N7143C	5-24-61	5-24-61	2,198,785	1,117,346
	N9744C	2- 1-61	2- 1-61	2,539,305	1,457,865
	N9745C	2-13-61	2-13-61	2,539,305	1,457,865
	N9746C	2- 6-61	2- 6-61	2,539,305	1,457,865
				27,441,034	12,815,145

Company: Western Air Lines, Inc. Year Ended Dec. 31, 1963

AIRCRAFT
(Owned) AIRCRAFT READY FOR FLIGHT

Type	Ship No.	Date of Mfg.	Date Acquired	Cost	Depreciated Cost
Boeing 720-B	N93141	4- 6-61	4- 6-61	4,967,633	4,004,106
	N93142	5- 8-61	5- 8-61	4,879,055	3,915,529
	N93143	6- 7-61	6- 7-61	4,879,052	3,915,525
	N93144	7-11-61	7-11-61	4,879,058	3,915,531
	N93145	7-24-62	7-24-62	5,105,562	4,403,648
	N93146	8- 7-62	8- 7-62	5,154,717	4,452,802
	N93147	8-27-62	8-27-62	5,154,881	4,452,966
	N93148	4- 3-63	4- 3-63	5,332,779	4,820,979
	N93149	4-24-63	4-24-63	5,332,523	4,820,723
	N93150	5- 3-63	5- 3-63	5,336,237	4,824,436
				51,021,497	43,526,245

CONCLUSIONS OF LAW

(1) Defendant Board's assessment unlawfully and arbitrarily included 720B and Electra aircraft which, although owned by plaintiff, were never used in air commerce in the State of Montana, in violation of the provisions of Sections 84-6401 (d), 84-6402, and 84-6404 of the Revised Codes of Montana, 1947, as amended.

(2) As a basis for its assessment defendant Board arbitrarily and unlawfully used a ratio based upon the value of plaintiff's total system property and plaintiff's system fly-away equipment, including 720B and Electra aircraft never used in air commerce within the State of Montana, rather than correctly using the lawful ratio based upon the value of plaintiff's total system property and the value of its fly-away aircraft used in air commerce within the State of Montana, namely DC-6B's.

(3) As a basis for its assessment defendant Board arbitrarily and unlawfully applied the unlawful ratio referred to in (2) above to the value of plaintiff's stock and debt, as a result of which the resulting stock and debt value unlawfully includes the value of flight property which was never used in air commerce within the State of Montana.

(4) As a basis for its assessment the defendant Board took into consideration the proportion between the system figures and the Montana figures for the following four items, namely tons originated and discharged, equated plane hours, revenue ton miles, and number of arrivals and departures, but the defendant Board arbitrarily and unlawfully based its calculations upon a comparison between system figures which would include 720B and Electra aircraft never used in air commerce within the State of Montana with the Montana figures, rather than correctly basing the same upon a comparison between system DC-6B figures and Montana figures, the latter of which by statutory definition are limited to DC-6B aircraft.

(5) As a basis for its assessment the defendant Board arbitrarily and unlawfully included in the value of capitalized net operating income, which is a factor used in the determination of the assessed value of all plaintiff's flight property operated or used in air commerce in Montana, the value of situs property located in Yellowstone County, Montana, upon which plaintiff pays and has paid personal property taxes in

accordance with the Constitution and laws of the State of Montana.

(6) The correct assessed value of plaintiff's flight property in 1964 is $830,638.00 as shown by paragraph XVII of Findings of Fact and the lawful tax owing to defendant, Yellowstone, County, thereon is $11,649.76.

(7) That $5,039.23 of the taxes paid by plaintiff to the treasurer of Yellowstone County on November 30, 1964 was unlawfully collected and that plaintiff is entitled to judgment in its favor for FIVE THOUSAND, THIRTY-NINE and 23/100 DOLLARS ($5,039.23) against the defendants, together with its costs in this suit expended.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED this 4th day of August, 1966.

E. E. Fenton

DISTRICT JUDGE

APPENDIX C

STATUTES INVOLVED

REVISED CODES OF MONTANA (1947)

FLIGHT PROPERTY OF AIRLINE COMPANIES — ASSESSMENT AND TAXATION — TITLE 84, CHAPTER 64

84-6401. Definitions. The following words and phrases, when used in this act, unless the context clearly indicates otherwise, shall have the meanings ascribed to them in this section:

(a) "Person" means any individual, corporation, firm, copartnership, company, or association, and includes any guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity therefor.

(b) "Scheduled airline company" means any person or company who undertakes directly or indirectly to engage in the business of scheduled air commerce.

(c) "Aircraft" means any contrivance now known or hereafter invented, used or designed for navigation of or flight in the air.

(d) "Flight property" means aircraft fully equipped ready for flight used in air commerce within the state of Montana.

(e) "Air commerce" means the transportation by aircraft of persons or property for hire in inter-

state, intrastate or international transportation on regularly scheduled flights.

(f) "Equated plane hours" means hours spent by aircraft in flight or on the ground weighted according to the cargo capacity of each aircraft.

(g) "Operating" or "operated" means landings or take-offs during interstate flight.

84-6403. Report by airline company. Every airflight property of all scheduled airline companies operating in Montana under a certificate of convenience and necessity issued by the United States civil aeronautics board shall be assessed annually by the state board of equalization.

84-6403. Report by airline company. Every airline company engaged in air commerce in this state shall annually, on or before the first day of May, file with the board in such form as the board may require, a report under oath, showing the following:

(1) The name of the person or persons, association, joint-stock company or corporation;

(2) Under the laws of what state organized or existing;

(3) The location of its principal office;

(4) The location of its principal office in this state, if any;

(5) The number of aircraft of each type or kind, the total original cost, the average cost per plane, the total depreciated cost, and the average depreciated cost per plane at the end of the preceding calendar year;

(6) The number of share of capital stock authorized, number of shares outstanding, the total par value and the total market value at the end of the preceding calendar year; the par value of outstanding bonds and long term debt, and the market value at the end of the preceding calendar year;

(7) Income account showing operating revenues and expenses of the entire system and net operating income during the preceding calendar year;

(8) The total tonnage of passengers, express and freight first received by the airline company in this state during the preceding calendar year plus the total tonnage of passengers, express and freight finally discharged by it within this state during the preceding calendar year, and the total of such tonnage first received by the airline company or finally discharged by it, within and without this state during the preceding calendar year;

(9) The total time in equated plane hours, of all aircraft of the scheduled airline company in flight in this state during the preceding calendar year, plus

the total time of such aircraft on the ground in this state during the preceding calendar year and the total of such time in flight or on the ground within and without this state during the preceding calendar year;

(10) The number of revenue ton miles of passengers, mail, express and freight flown by the scheduled airline company within this state during the preceding calendar year and the total number of such miles flown by it within and without this state during the preceding calendar year;

(11) The number of arrivals and departures of all aircraft of the scheduled airline company in this state during the preceding calendar year and the total number of such arrivals and departures within and without this state during the preceding calendar year;

(12) Such other information as the board may require.

84-6404. Determination of value. The board shall determine the full and true valuation of all flight property operated or used by every scheduled airline company in air commerce in this state. In determining the valuation apportioned to this state of such flight property, the board may consider the proportion of total tonnage in the state, total time in equated plane hours, number of revenue ton miles and number of arrivals and departures as required to be reported under section 84-6403.

84-6405. Hearing before board. After making such assessment the board shall give at least ten (10) days' written notice thereof to the person or persons to whom the assessment is made, together with time and place of hearing thereon, at which time and place such person or persons, or any taxpayer may appeal (appear) before the board in person, or otherwise, to show cause why such assessment should be either lowered or raised.

84-6406. Procedure on failure to file statement. If any airline company shall refuse or neglect to make the statement required by this act to the board, or shall refuse or neglect to permit an inspection and examination of its property, its records, books, accounts, or other papers when requested by the board or shall refuse or neglect to appear before the board when required so to do, the board shall assess the property of such airline company according to its best judgment on available information, and may add to the assessment a penalty not exceeding ten per cent (10%) of the assessment, and such airline company shall be estopped to question or impeach the action or determination of the board thereon.

84-6407. Transmission of statement of amount apportioned to counties. On or before the second Monday in July, the board shall apportion such assessment to the counties in or through which the airline oper-

ates. The county assessor must enter the amount of the assessment apportioned to the county in the column of the assessment roll or book which shows the total value of all property for taxation in the county. The assessment shall be assigned to class 7 having a taxable value of forty per cent (40%) of assessed value.

84-6408. Record of assessment and apportionment of properties. The state board of equalization must keep a record of all such assessments and apportionments.

84-6409. Effect of adjudication act unconstitutional. If any section, sentence, clause or phrase of this act is for any reason held to be unconstitutional or invalid, such decision shall not affect the validity of the remaining portion of this act. The legislative assembly of the state of Montana hereby declares that it would have passed this act irrespective of the fact that any one or more sections, sentences, clauses, or phrases may be declared unconstitutional or invalid.

84-6410. Extension of time for making report. The board for good cause may extend for not to exceed thirty (30) days the time for making a report as required under section 84-6403.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1967

No. 573

WESTERN AIR LINES, INC., a corporation,

Respondent,

vs.

CATHERINE J. MICHUNOVICH, Treasurer of Yellowstone County, Montana; YELLOWSTONE COUNTY; and THE STATE BOARD OF EQUALIZATION OF THE STATE OF MONTANA,

Petitioners.

RESPONDENT'S BRIEF

Of Counsel:
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Great Falls, Montana 59401
Attorney for Respondent.

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RESPONDENT'S BRIEF

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

* * *

CONSTITUTIONAL PROVISIONS

Amendment XIV of the Constitution of the United States:

1. * * * nor shall any state deprive any person of life, liberty, or property, without due process of law, * * *

Article III of the Constitution of the State of Montana:

Sec. 27. No person shall be deprived of life, liberty, or property without due process of law.

ARGUMENT

GROUNDS WHY THE CAUSE SHOULD NOT BE REVIEWED BY THIS COURT

A. The Constitution of the State of Montana Supports the Judgment.

Respondent's Complaint charged that Petitioner by including in its assessment aircraft never used in air commerce in Montana deprived Respondent of its property without due process of law in violation of the Fourteenth Amendment of the United States Constitution and § 27 of Article III of the Constitution of Montana. [See Paragraph XIV, Section (10), page 7 of Complaint in Record (all page references to record use page number in original document considered by the State Court)].

The opinion of the Supreme Court of Montana specifically approved the unitary method of assessment based upon the concept of organic unity. However, the Court cautioned that certain constitutional requirements must be satisfied to prevent the unitary method from becoming an octopus which extends the taxing power of the state beyond its legal limit. (Appendix A to Petition for Writ of Certiorari, page 7). It concluded that the inclusion of jet aircraft values bearing only 0.50% passenger transfer values to the Montana operated aircraft results in excessive taxation. (Same: pages 7 and 8).

In *Wallace v. Hines*, 253 U.S. 66, 40 S. Ct. 435,

64 L. Ed. 782, this Court held that state taxation of property beyond its borders which did not add to the value of taxpayer's property and rights within the state was an unwarranted interference with interstate commerce and a taking of property without due process of law.

The Montana Constitution prohibits taking property without due process of law, and by itself fully supports the foregoing conclusions of the State Court. The United States Supreme Court decisions on due process are equally applicable to the almost identical provisions of the Montana Constitution.

Since the decision rests on an adequate state ground, the United States Supreme Court has no jurisdiction to review the same.

Jankovich v. Indiana Toll Road Commission, 379 U.S. 487, 85 S. Ct. 493, 13 L. Ed. 2nd 439.

See also *Department of Mental Hygiene of California v. Kirchner,* 380 U.S. 194, 85 S. Ct. 871, 13 L. Ed. 2nd 753.

B. The State Court's Decision is In Accord with Applicable Decisions of the United States Supreme Court.

The heart of the State Court's decision is the factual determination that there was a total lack of significant "organic unity" between the DC-6B operations, in Montana and elsewhere, and the rest of Respondent's system [Appendix A to Petition for Writ of Certiorari. Pages 2 and 7 and 8.] Therefore, the values of those jet aircraft used in the rest of Respondent's system were eliminated.

This result is supported by applicable decisions of this Court.

In *Wallace v. Hines,* 253 U.S. 66, 40 S. Ct. 435, 64 L. Ed. 782, it was held that property outside North Dakota which did not affect the value of the North Dakota part of the railroad should be eliminated in computing the North Dakota tax.

In *Southern Railway Company v. Kentucky,* 274 U.S. 76, 47 S. Ct. 542, 71 L. Ed. 934, this Court recognized that the state could take into consideration parts of the system outside the state operated in connection with the parts within it, but this Court stated that it is not permissible for the state to take into account any of the outside property unless it could be seen in a plain and intelligible way that it added to the value of the road and the rights exercised in the state.

To the same effect are the other decisions of this Court where similar questions have been presented.

CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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